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JASATERA BHD

v.

SEE CHEW BEAW & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
LIM YEE LAN J
[CASE NO: D-22-144-2002]
6 NOVEMBER 2009

C ***EVIDENCE:*** *Exhibit - Admissibility - Admissibility threshold of ID34 - Whether satisfied - Factors to consider*

EVIDENCE: *Exhibit - Admissibility - Whether ID34 should be admitted into evidence under ss. 32(1)(b), 34 and 163 Evidence Act 1950 - Whether requirements of sections complied with - Factors to consider*

D

This was an application by the plaintiff to admit ID34 as an exhibit pursuant to ss. 32(1)(b), 34 and 163 of the Evidence Act 1950 ('Act'). ID34 was a cash book that recorded the plaintiff's daily collections of cash and cheques. Counsel for the 1st E defendant objected to the application on the ground that the conditions laid down in the various sections for the admission of ID34 had not been met by the plaintiff. The sole issue that arose for determination before this court was whether ID34 should be admitted as an exhibit in these proceedings.

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Held (admitting ID34 as an exhibit under ss. 34 and 163 but not under s. 32(1)(b) of the Act):

(1) At this stage of the application, the court had only been concerned with the admissibility threshold and not with the G accuracy or weight of ID34 which had been the second question and which would only be determined at the end of the trial after considering the totality of the evidence adduced before the court. (paras 5-6)

H **(2)** In respect of s. 32(1)(b), the plaintiff had failed to satisfy the conditions that had been laid down in the opening portion of that section for the admission of ID34, *ie*, it had failed to prove that "the attendance of the person, whose statement is proposed to be tendered in evidence, cannot be procured

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without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable". There had simply not been any material before the court to determine who the maker(s) of ID34 had been, their whereabouts and why their attendance could not be procured without an amount of delay or expense which under the circumstances of the case appeared unreasonable to the court. Consequently, ID34 could not be admitted under s. 32(1)(b) of the Act. (paras 8-9)

(3) ID34 could be admitted under s. 34 as, following the case of *Sim Siok Eng*, the two conditions that needed to be satisfied before s. 34 could apply, had been satisfied. Following the authority of *Tay Choo Foo*, ID34, at the material time, had been a book of accounts regularly kept by the plaintiff in the course of its business and had thus fallen under s. 34 of the Act. The second condition under s. 34 had also been met by the entry of words and figures at p. 74 of ID34 which had a direct bearing on a fact in issue which the court had to inquire into. Thus ID34 had fallen under s. 34 as a book of accounts regularly kept in the course of business of the plaintiff at the material time. (paras 10, 17 & 20-22)

(4) ID34 had satisfied the four requirements of s. 163 and would be admitted thereunder for the following reasons. Firstly, it had been a "document" called for by the 1st defendant pursuant to his Notice to Produce. Secondly, it had been directly relevant to a fact in issue which the court had to enquire into. Thirdly, it had been inspected by the 1st defendant after it had been called for production. Finally, the plaintiffs had required the 1st defendant to put it into evidence. Looking at ID34 as a whole, it had been a document which had to either be admitted in its entirety or not at all. It had not been for either party to pick and choose which part they would accept and which part they would reject. (paras 28 & 32-37)

Case(s) referred to:
AlliedBank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***
Devi Singh v. Mt Phulma Rao AIR [1961] HP 10 ***(refd)***
Paramill Sdn Bhd & Anor v. Datuk Joseph Pairin Kitingan [2007] 6 CLJ 192 CA ***(refd)***
PP v. Chow Kam Meng [2001] 7 CLJ 387 HC ***(refd)***
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 747 HC ***(refd)***
PP v. Mohd Jamil Yahya & Anor [1994] 1 CLJ 200 HC ***(refd)***
PP v. Mogan Ayavoo [2004] 3 CLJ 623 HC ***(refd)***
PP v. Norfaizal Mat (No 2) [2008] 8 CLJ 576 HC ***(refd)***
Palaparthi Ramamurthi v. Palaparthi Subba Rao & Ors AIR [1937] Mad 19 ***(refd)***
Sim Siok Eng & Anor v. Poh Hua Transport and Contractor Sdn. Bhd [1980] 1 LNS 70 FC ***(foll)***
Sim Tiew Bee v. PP [1973] 1 LNS 138 FC ***(refd)***
Tan Gong Wai v. PP [1984] 1 LNS 156 FC ***(refd)***
Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal [2009] 2 CLJ 363 CA ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 32(1)(b), (2), 34, 163

Other source(s) referred to:
Evidence – Practice and Procedure, 3rd edn, p 1137
Sarkar on Evidence, 15th edn, 1999, pp 2314-2316

For the plaintiff - Wong Kian Kheong (Yiew Voon Lee & Alex Tan Chie Sian with him); M/s CH Yeoh & Yiew
For the 1st defendant - Porres P Royan (T Sudharsanan & WT Low with him); M/s Shook Lin & Bok
For the 2nd & 3rd defendants - KY Leong; M/s S Sothi, Leong & Partners
For the 5th defendant - Robert Lazar (Lai Wai Fong with him); M/s Shearn Delamore & Co
For the 6th defendant - John Fam (Freda Santhiago with him); M/s SN Fam & Co

Reported by Sharmini Pillai

JUDGMENT

Lim Yee Lan J:

Application

[1] This is an application by learned counsel for the plaintiff to admit ID34 as an exhibit pursuant to ss. 32(1)(b), 34 and 163 of the Evidence Act 1950 ("the Act").

[2] ID34 was produced by the plaintiff through PW1 pursuant to a notice to produce issued by learned counsel for the 1st defendant dated 25 September 2008 in which item (b) calls for the production of "plaintiff's cash book relating to all transactions for January and February 1997". Plaintiff's application under s. 163 is on the basis that since PW1 in his evidence has confirmed that ID is a cash book and DW4, who was the director of the plaintiff at the material period, has also admitted during cross-examination by learned counsel for the 1st defendant that it is a book that records plaintiff's daily collections of cash and cheques, ID34 ought to be admitted in evidence.

[3] Besides s. 163 the plaintiff is also relying on ss. 32(1)(b) and 34 to admit ID34. In s. 32(1)(b) the words "in the course of business" (which also appears in s. 34) have been given a liberal and broad interpretation in the latest decision of the Court of Appeal (CA) in the case *Tay Choo Foo v. Tengku Mohd. Saad Tengku Mansur & Ors And Another Appeal* [2009] 2 CLJ 363 to mean "the way the business (which may be of a purely private or even trivial nature) is conducted and have no connection with the course of business suggesting a series of acts of business".

[4] Learned counsel for the 1st defendant objected to the application on ground that the conditions laid down in the various sections for the admission of ID34 have not been met by the plaintiff.

[5] I agree with learned counsel for the plaintiff that at this stage of the application the court is only concerned with the admissibility threshold and not with the accuracy or weight of ID34 which is a second question to be determined only at the end of the trial after considering the totality of the evidence adduced before the court.

[6] In this application, having read the provisions of s. 32(1)(b), s. 34 and 163 of the Act, various text book and case law authorities on the principle and scope of the aforementioned sections, the evidence of PW1 and DW4 (2nd defendant) on ID34 and the respective oral submissions of learned counsel, I am of the view and hereby rule that ID34 can be admitted as an exhibit under ss. 34 and 163 of the Act but not under s. 32(1)(b) based on following reasons:

A **Section 32(1)(b)**

[7] In regard to s. 32(1)(b), the relevant portion particularly relied on by plaintiff's counsel read as follows:

B > Statements, written or verbal, of relevant facts made by a person ... whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
C > (b) ... and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or ... of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated,
D > written or signed by him.

[8] In respect of s. 32(1)(b), I am in agreement with learned counsel for the 1st defendant that the plaintiff has failed to satisfy the conditions laid down in the opening portion of s. 32(1) of the
E Act for the admission of ID34, that is, it has failed to prove that 'the attendance of the person, whose statement is proposed to be tendered in evidence, cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable'.

F **[9]** In this case, there was simply no material before me to determine who were the maker or makers of ID34, their whereabouts and why their attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable (see
G *Sim Tiew Bee v. PP* [1973] 1 LNS 138, *PP v. Mohd Jamil b. Yahya & Anor* [1994] 1 CLJ 200, *Tan Gong Wai v. PP* [1984] 1 LNS 156, *PP v. Lam Peng Hoa & Anor* [1996] 3 CLJ 747, *AlliedBank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33, *PP v. Mogan Ayavoo* [2004] 3 CLJ 623, *PP v. Chow Kam Meng* [2001]
H 7 CLJ 387 and *PP v. Norfaizal Mat (No. 2)* [2008] 8 CLJ 576 involving the admission of certain statements made by witnesses who could not be found one way or the other). Consequently I hold that ID34 cannot be admitted under s. 32(1)(b).

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Section 34

[10] In respect of s. 34, the question is whether ID34 qualifies as "a book of accounts regularly kept in the course of business" of the plaintiff?

[11] Learned counsel for the plaintiff in submitting that ID34 qualifies as "a book of accounts regularly kept in the course of business" of the plaintiff relied for his authority the decisions of the FC case of *Sim Siok Eng & Anor v. Poh Hua Transport and Contractor Sdn. Bhd* [1980] 1 LNS 70 (by Salleh Abbas), *Paramill Sdn. Bhd & Anor v. Datuk Joseph Pairin Kitingan* [2007] 6 CLJ 192 and the latest decision of the CA in the case of *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal* [2009] 2 CLJ 363.

[12] In particular, learned counsel cited *Tay Choo Foo* in which the CA upheld the decision of the HC in reliance on certain Indian decisions (*Devi Singh v. Mt Phulma Rao AIR* [1961] HP 10 and *Ramamurthi v. Subba Rao* [1937] Mad 19) that the words "in the ordinary course of business" appearing in s. 32(1)(b) of the Act (which appears, *inter alia*, also in s. 34) should be given "a broad and liberal connotation". In particular, in *Ramamurthi v. Subba Rao* the court was of the view that the words "in the ordinary course of business" in s. 32(1)(b) means "the way the business (which may be of a purely private or even trivial nature) is conducted and have no connection with the course of business suggesting a series of acts of business".

[13] It was further submitted even that the FC's decision in *Sim Siok Eng* implies that whether a book is kept "in the ordinary course of business" cannot be established by direct evidence but by looking at the nature of the document and whether as a matter of inference the entries therein were made in the course of business (the intrinsic evidence) and whether such entries are supported by other oral or documentary evidence which tend to corroborate the entries made (the extrinsic evidence).

[14] In the case before me, the court was invited to look at ID34 itself to see whether as a matter of inference the entries were indeed recorded in the ordinary course of business of the plaintiff. Secondly, the court is also invited to look at the oral evidence of DW4 which it is submitted corroborated plaintiff's

A case that ID34 is a cash book of the plaintiff at the material time (ie, January and February 1997). DW4 was the Director of the plaintiff's company at the material time and although he denied that ID34 was a cash book of the plaintiff because the entries were not chronologically recorded, he did however admit that
B ID34 is a book that "records daily collections and issuance of cheques" of the plaintiff. DW4 further states that the official cashbook is in the computer system and there is no other hard copy except this cash book in ID34.

C **[15]** It was submitted that accuracy or otherwise of the entries in ID34 is a question of weight to be decided by the court at the end of the full trial. The court can admit ID34 as an exhibit and say the cash book is totally useless, but that is a second question. At this stage it should only be concerned with the threshold of
D admissibility which by virtue of *Sim Siok Eng* and *Tay Choo Foo* is quite a low one.

[16] Learned counsel for the 1st defendant, on the other hand, submits that firstly, the decision in *Tay Choo Foo* is on appeal and
E is awaiting decision from the Federal Court and the outcome is still unknown and secondly, *Sim Siok Eng* is a case that establishes the principle that in determining whether a book is kept in the ordinary course of business, there must be evidence that the entries made therein were made in the ordinary course of business
F and there must be some sort of system in making such entries. DW4 had denied that ID34 was the plaintiff's cash book. All he said was that it is a book that records the daily collections of cash and cheques of the plaintiff. There was thus no evidence whatsoever that ID34 was a book kept in the ordinary course of
G the plaintiff's business. Consequently ID34 cannot be admitted into evidence and has to remain as ID.

[17] Having considered the respective submissions of both counsel I am of the view that ID34 can be admitted under s. 34. It is clear from, *inter alia*, *Sim Siok Eng* that in order for s. 34 to apply,
H two conditions must be satisfied, ie,:

(1) the entries are in a book of account regularly kept in the course of business; and

I (2) the entries therein refer to a matter into which the court has to inquire.

[18] In respect of the first condition, I agree with learned counsel's submission that based on the FC's decision in *Sim Siok Eng*, whether a book is kept "in the ordinary course of business" can be established by looking at the nature of the document as a whole whether as a matter of inference the entries therein were made in the course of business (the intrinsic evidence) and whether there are extrinsic evidence in the form of other oral and documentary evidence of witnesses which tend to corroborate the entries made.

[19] I am also in agreement with learned counsel that based on the liberal and broad interpretation given to the words "in the ordinary course of business" appearing in ss. 32(1)(b) (which are also found in 34 of the Act) by the CA in *Tay Choo Foo*, there need not be a system of entries so long as the book is regularly kept by way or in the manner of business. Whilst it is true that *Tay Choo Foo* is on appeal but until such time it still remains as good law.

[20] In this case, keeping in mind that at this stage of the application my concern is only on the issue of threshold of admissibility, and having perused ID34 itself and the evidence of PW1 and DW4 on its status as narrated above, and the authority of *Tay Choo Foo*, I am prepared to accept as a matter of inference that ID34 is a book of accounts regularly kept by the plaintiff in the course of its business at the material time and therefore falls under s. 34 of the Act.

[21] With regard to the second condition in s. 34, ie, whether the entries in ID34 refers to "a matter into which the court has to inquire", I am of the opinion that this condition has been met as the entry in p. 74 of ID34 containing the words: "Gunung Nagasari" in the second column and the figure "20,000.000" in the 5th column has a direct bearing on a fact in issue which this court has to enquire, ie, whether it relates to the repayment by Gunung Nagasari for certain advance given by plaintiff as claimed by PW1 or whether it relates to repayment of the RM20 million paid to Messrs Vincent, Lim and Teoh for aborted share investments in two companies, Wing Tiek and YCS, as claimed by the defendants.

[22] Based on the foregoing discussion, it is thus my view that ID34 falls under s. 34 as a book of accounts regularly kept in the course of business of the plaintiff at the material time.

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Section 163

[23] The plaintiff also relies on s. 163 for the admission of ID34 as an exhibit. Section 163 reads as follows:

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> When a party calls for a document which he has given the other party notice to produce, and the document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so and if it is relevant.

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[24] In his book entitled *"Evidence – Practice and Procedure"* 3rd edn, at p. 1137, Augustine Paul comments that the object of this section is to prevent a notice from being used as a method of gaining inspection of documents without using them if they turn out to be unfavorable. The section provides that a party is bound

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to give the opponent's document as evidence if the following conditions are satisfied:

(a) A party must have called for a document by giving the other party notice to produce;

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(b) It should have been inspected by the party calling for its inspection;

(c) The document must be relevant; and

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(d) The party producing the document should require the party calling for it to put it in evidence.

[25] Further in *Sarkar on Evidence* – 15th edn, 1999, at pp. 2314-2316, the commentary on s. 163 reads as follows:

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> Principle and Scope – this sections says that if – (i) a party produces a document upon the notice (see s. 66 *ante*) of another party, and (ii) the latter party inspects the document, then (iii) the party calling is bound to use it as his evidence, if the party producing the document requires it. It applies to both civil and criminal trial (*Govt of Bengal v. Santiram, infra; R v. Makhan* [1939], 2 Cal 429: A 1940 C167). All the three conditions must be fulfilled.

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> The mere calling for a document and its production, by the opposite party, however, does not bind the party calling, to put it in evidence. The obligation comes upon when he inspects the document and the party producing requires him to put it in

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evidence. When these requirements are fulfilled, no further proof is necessary before admission (*Govt of Bengal v. Santiram* 58 C 96: A [1930] C 370: 127 IC 657).

The document should of course be relevant to the matters in issue. The rule therefore involves these elements: (1) If a document is produced by one party on notice from his opponent, it does not for that reason become evidence. The latter may waive his desire to make it evidence. (2) If, however, he inspects the document, the other party can insist on its being treated as evidence and it becomes the evidence of both parties. The introduction of this rule has been considered necessary because it would be manifestly unjust and unfair to permit one to gain an undue advantage by looking into the documents of his opponent without being obliged to use it as evidence for both of them. Under the pretext of a desire to use in evidence, a party might call for documents the contents of which were not known to him and finding that they did not suit his purpose or went against him, he might wriggle out of the situation by discarding them. This mainly is the reason for the penal rule.

This section follows the rule in English law. In practice a party who has given to his opponent notice to produce certain documents is allowed to call for them at any stage of the hearing. The production of papers upon notice does not make them evidence in the course unless the party calling for them inspects them, so as to become acquainted with their contents: in which case he is obliged to use them as his evidence (*Calvert v. Flower,* 7 C & P 386; *Wharam v. Routledge,* 5 Esp 235), at least if they be in any way material to the issue (*Wilson v. Bowie*, 1 C & P 10: *Sayer v. Kitchen*, 1 Esq 210). The reason or this rule is, that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties (Tay s. 1817). When A calls upon B to produce a document and B produces it, this *prima facie* avoids the necessity of proving such document on A's part where it is relied on by B as part of this title (Wharton, s. 156).

When a document is called for and inspected, the party producing is entitled to have it exhibited, but such exhibiting is always subject to proof of execution and genuineness. S. 163 does not render proof of the documents exhibited unnecessary or alter the normal incidence of burden of proof.

A Under s. 163 an inspection of documents by adversary entitles the party producing them to tender them as evidence of both parties. Such account books need no further proof and should be admitted in total and not merely in parts favourable to the party calling for it (*Kishan v. Puransa*, 106 IC 305: A [1938] N 119; see *Rajeswari*
B *v. Bal Kishan*, *ante*; *Badri v. Shanti*, A [1941] L 228).

The documents admitted under s. 163 must not be deemed to be conclusive evidence against the inspecting party. They become evidence for all they are worth (*Ramadhin v. Ramdayal*, 23 OC 156: 57 IC 973).

C **[26]** As clearly stated in the commentaries to s. 163 cited earlier, whether ID34 can be admitted into evidence depends on whether it complies with all the conditions laid down for its admission under the said section.

D **[27]** Learned counsel for the 1st defendant submits that what the 1st defendant asks for in its notice to produce is the "plaintiff's cash book relating to all transactions for January and February 1997". The 1st defendant did not ask for any other book or document. In this case, the 2nd defendant (DW4) had in his
E evidence during cross examination denied that ID34 was a cash book of the plaintiff. What he said was that plaintiff's cash book is in the computer system and ID34 was a book which records the daily collections of cash and cheques received by the plaintiff. Therefore the ID34 is not the "document" that 1st defendant has
F asked to produce.

[28] The issue here is whether ID34 has satisfied the four conditions laid down in s. 163 for its admission under the said section.

G **[29]** As regards the first condition, the issue is whether ID34 is a "document" called for by the 1st defendant pursuant to his notice to produce dated 25 September 2008? This would depend on whether ID is a cash book kept by the plaintiff at the material
H time.

[30] I have earlier pursuant to s. 34 accepted that ID34 is a book of accounts of the plaintiff kept in the ordinary course of its business during the material time. The question is whether ID34 is a cash book of the plaintiff for the material time?

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[31] As stated earlier, I have accepted the evidence of DW4 who was the Director of the plaintiff at the material time that the cash book of the plaintiff is in the computer system and that there was no other hard copy of the cash book except ID34. Although DW4 denied that ID34 was the cash book because it was not prepared in a chronological order, he did admit that it was a book that records the daily cash and cheque of the plaintiff. I don't believe this court is bound by what DW4 said as to what is or is not the status of ID34. It is matter of inference looking at the entries in ID34 that being a book of accounts that records the daily cash and cheque collection of the plaintiff and the fact that no other hard copy of cash book existed of such cash entries, it can and should qualify as a cash book of the plaintiff.

[32] I therefore hold that ID34 is a "document" called for by the 1st defendant pursuant to his notice to produce dated 25 September 2008 and therefore the first condition has been satisfied by the plaintiff.

[33] In so far as the second condition is concerned, I believe that ID34 is directly relevant to a fact in issue which this court has to enquire, ie, whether a particular entry therein under the words "Gunung Nagasari" and the figure "20,000,000" relate to repayment of certain advance given by plaintiff to the same or whether it was a repayment of the RM20 million paid to Vincent Lim & Teoh for aborted share investments in two companies, Wing Tiek and YCS, as claimed by the defendants. Therefore the second condition has also been satisfied by the plaintiff.

[34] With regard to the question whether ID34 has been inspected by the 1st defendant after it has been called for production, it is my view that plaintiff has more than satisfied this condition. It is clear from pp. 8, 9, 18 and 2, 26 and 27 of the notes of proceedings that PW1 was extensively cross-examined by learned counsel for the 1st defendant and also counsel for the 2nd and 3rd defendants on a number of missing entries in a number of pp. in ID34. Therefore the question of their not having inspected the document did not arise for consideration.

[35] Finally, with regard to the fourth condition, it is not in dispute that the plaintiff has required the 1st defendant to put ID34 into evidence.

[36] Consequently, I hereby hold that the plaintiff has satisfied all the conditions imposed in s. 163 for the admission of ID34 as the evidence of both parties.

[37] Looking at ID34 as a whole, it is my view that it is a document that has to be admitted either in its entirety or not at all. It is not for either party to pick and choose which part they would accept and which part they would reject.

[38] As stated in *Sarkar on Evidence* quoted earlier, "... (1) If a document is produced by one party on notice from his opponent, it does not for that reason become evidence. The latter may waive his desire to make it evidence. (2) If, however, he inspects the document, the other party can insist on its being treated as evidence and it becomes the evidence of both parties. In this case, I therefore direct that ID34 be admitted as the evidence of both parties.

[39] I am of course reminded that under s. 34 of the Act the entries in ID34 alone shall not be sufficient to charge the defendants with liability for the sum sued. There must be other evidence to corroborate the truthfulness of these entries. Similarly, as commented in *Sarkar On Evidence*, a document admitted under s. 163 must not be deemed to be conclusive evidence against the inspecting party. They become evidence for all they are worth.

[40] Nevertheless, these are issues that relate to the weight to be given to ID34 after its admission which can only be determined at the end of the trial by looking at all the evidence adduced before me. At this stage I am only concerned with the admissibility threshold which by virtue of *Sim Siok Eng* and *Tay Choo Foo* is quite a low one.

[41] In conclusion, based on the foregoing discussions and reasons, I hereby order that ID34 be admitted into evidence and converted as P34.